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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ...4561

IN THE MATTER OF THE APPLICATION

of

VERNON MURPHY,

Petitioner,

v.

LEO A. LARKIN, Corporation Counsel of the City of New York, THEODORE H. LANG and GEORGE GREGORY, JR., constituting the Municipal Civil Service Commission of the City of New York, ARTHUR C. FORD, EDWARD C. McGUIRE and HERBERT M. ROSENBERG, constituting the Board of Water Supply of the City of New York, and ABRAHAM D. BEAME, Comptroller of the City of New York,

Respondents.

PETITION TO THE UNITED STATES SUPREME COURT FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above entitled case by remittitur dated February 4, 1965 as amended after rehearing by an order dated June 10, 1965.

Citations to Opinions Below

The Remittitur of June 10, 1965 on the motion for reargument was without opinion, except for the certification of the constitutional question, and is as yet unreported.

The original decision of the Court of Appeals decided February 4, 1965 was also without opinion. A memorandum of the argument compiled by the Reporter appears in 15 N. Y. 2d 770, and is printed in Appendix A hereto, *infra,* page 15. The opinion of the Appellate Division, affirmed by the Court of Appeals in 15 N. Y. Reports, 2nd Series, was reported in 20 A. D. 2d 595 and is printed in Appendix A hereto, *infra,* page 18. A prior opinion of the Appellate Division of the Supreme Court of the State of New York, Third Department, was reported in 17 A. D. 2d 87 and is printed in Appendix A hereto, *infra,* page 20.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was set forth in the Remittitur dated February 4, 1965, page 26, *infra,* rehearing was denied by Remittitur dated June 10, 1965, *infra,* page 30. No orders or judgments have been entered by the respondents based on any of the Remittiturs.

The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1257 (3).

The proceedings in the Courts of the State of New York of original and appellate jurisdiction have finally determined the petitioner's application for reinstatement to the position of Principal Attorney in the Civil Service of the City of New York adversely to the petitioner, and there are no further proceedings pending or possible in the absence of a reversal of the Court of Appeals by this Court.

In its Remittitur denying petitioner's application for a hearing dated the 10th day of June, 1965, the Court of Appeals certified that upon the appeal herein there were presented and necessarily passed upon questions under the Fourteenth Amendment of the United States Constitution, as more particularly set forth under the following heading.

Question Presented

The precise question presented was submitted to the Court of Appeals of the State of New York as follows:

> "Did the summary dismissal of the petitioner from the position of Principal Attorney in the Civil Service of the City of New York, without cause, or compliance with Section 75 of the Civil Service Law of the State of New York deprive appellant of due process and equal protection of law in derogation of the Fourteenth Amendment of the U. S. Constitution?"

The Court of Appeals *on its own motion* recast the question as follows:

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Appellant contended that his removal from his position without stated charges and a hearing constituted a violation of his rights to equal protection of the laws and due process under the Fourteenth Amendment to the United States Constitution. The Court of Appeals, passing upon such contentions, held that there was no violation of appellant's constitutional rights [15 N Y 2d 770]."[1]

Statute Involved

It is the contention of the petitioner that the decisions of the Courts of the State of New York in this proceeding distort the meaning of the New York State Constitution, Article V, Section 6, *infra*, page 4, and the Civil Service

---

[1] The certification of the Federal question by the Court of Appeals establishes that this petitioner was a "person holding a position by permanent appointment in the competitive class of the classified Civil Service"; otherwise, the petitioner's dismissal created no constitutional issue.

Law, Section 75.1.a., *infra*, page 6, to deprive the petitioner of a hearing on stated charges guaranteed him by the United States Constitution as follows:

Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."
>
> "The Fourteenth Amendment can be violated by a State judiciary in the course of construing an otherwise valid State statute so as to deprive a person of due process of law." (*Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U. S. 673; *Bouie* v. *Columbia*, —— U. S. ——, 12 L. Ed. 2d 894, 84 S. Ct. ——).

Statement

This application for certiorari involves a proceeding in the nature of a mandamus under Article 78 of the Civil Practice Act (now CPLR, Art. 78), to compel the respondents to reinstate the petitioner to the position of Principal Attorney in the Competitive Class of the Civil Service of the City of New York from which he had been summarily removed without a hearing on stated charges as provided by Civil Service Law, Section 75.

The Constitution of the State of New York, Article V, Section 6, provides as follows:

> "Appointments and promotions of the Civil Service of the State and all of the Civil divisions thereof, including cities and villages, shall be made according

to merit and fitness to be ascertained, *as far as practicable,* by examination, which, *as far as practicable,* shall be competitive;" (Emphasis supplied)

The following is established by uncontradicted proof:

On July 27, 1955 petitioner was appointed to the permanent position in the Competitive Class of the Municipal Civil Service of the City of New York, as follows:

"Vernon Murphy, Esq., 15 Albany Street, Kingston, N. Y.

"You are hereby appointed to the position of Assistant Counsel (Water Supply), as head of our Kingston Office, with salary at the rate of $12,000 per annum, pursuant to Rule 5, Section 9, Paragraph 10, of the Civil Service Rules and Regulations, effective July 27, 1955." (A 13)*

Rule V.IX.10 follows:

"V

"The Competitive Class . . .

"Section IX. Temporary and Exceptional Appointments . . .

"10. The Commission, may, by resolution, exempt from competitive examination any person who is to be appointed for service in a locality outside the City of New York who is a resident of such locality, and when appointment for such service from an eligible list is found to be not practicable, but no such person shall be eligible for transfer or assignment to work within the city."

On the 23rd day of August 1955, the Civil Service Commission of the City of New York certified by resolution

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* "A" followed by numeral refers to Appendix to Appellant's Brief to the Court of Appeals.

that a Competitive examination to fill this position was impractical (A 28).

On the 17th day of July 1956 petitioner was reclassified into another Competitive Title, as follows:

> "I am pleased to inform you that your position as Attorney has been up-graded under the Career and Salary Plan to the title of Principal Attorney with a salary range of $11,200 to $13,600 per annum." (A 16)

Section 96 of the Civil Service Law of the State of New York provides as follows:

> "Waiver of rights
>
> "No public officer nor any employee acting for a public officer shall require a candidate for employment to sign any document whereby such candidate for employment waives any right or rights accruing to him . . ."

On the 6th day of April 1961, the City attempted to dismiss petitioner, without cause, as follows:

> "Your services as a provisional principal attorney in the Division of Water Supply office at Kingston, N. Y. are hereby terminated, effective April 5, 1961." (A 18)

For the purposes of this application, petitioner contends only that upon the foregoing uncontradicted proof his purported dismissal disregards the provisions of the Civil Service Law, Section 75:1.a. as follows:

> "1. Removal or disciplinary actions. A person described in paragraph (a) or paragraph (b) of this subdivision shall not be removed . . . except for incompetency or misconduct shown after a hearing upon stated charges . . .

"(a) A person holding a position by permanent appointment in the competitive class of the classified civil service, or

"(b) a person holding a position by permanent appointment or employment in the classified service of . . . any . . . political or civil division of the state or of a municipality, . . . who is an honorable discharged member of the armed forces of the United States . . . except when a person described in this paragraph holds the position of private secretary, cashier or deputy of any official or department."

The issue, therefore, is reduced to the simple question which petitioner presented to the Court of Appeals on the application to amend the remittitur herein:

"Did the summary dismissal of the petitioner from the position of Principal Attorney in the Civil Service of the City of New York, without cause, or compliance with Section 75 of the Civil Service Law of the State of New York deprive the appellant of due process and equal protection of law in derogation of the Fourteenth Amendment of the U. S. Constiution?"[2]

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[2] The dilution of this question by the Court of Appeals *on its own motion* is indicative of a policy of the Courts of the State of New York to subordinate Civil Rights to Executive privilege "in defiance of the Fourteenth Amendment" to use the words of Dean Rostow delivered to the New York County Lawyers Association on December 10, 1964. (Bar Bulletin, Volume 22, No. 3, 1964-65, p. 103). A defiance which Dean Rostow rightfully attributes to the "compromise" resolving the disputed election of 1876, which resulted in this state in the hypocrisy of *Broderick* v. *Morton*, 156 N. Y. 136; the cold-blooded denial exemplified by *Steger* v. *Farrell*, 15 N. Y. 2d 994, affirming 22 A. D. 2d 729, and the subtle avoidance underlying *Howard* v. *Rockefeller*, 15 N. Y. 2d 927, modifying 22 A. D. 2d 479, all of which rationalize this local tradition to sacrifice Civil Rights in conflict with Executive and Legislative privilege. For more of the same see the dicta in *People ex rel. Rosenthal* v. *Travis*, 169 A. D. 203, an entirely inapposite case cited in all of the opinions below. Respondents have contributed nothing to the arguments created *by the Courts* to rationalize petitioner's dismissal without a hearing.

The Appellate Division twice found in 17 A. D. 2d 87 and 20 A. D. 2d 595, that petitioner held a position by permanent appointment in the competitive class of the classified civil service* but concluded that petitioner could nevertheless be summarily dismissed, without charges or hearing, because petitioner was a "deputy".

The petition herein was originally dismissed upon the papers by Elsworth, J. at a Special Term of the Supreme Court of the State of New York, for reasons which are not even suggested by the respondents (A 54; A 70) and are in conflict with the Rules of the City Civil Service Commission disgested at pages 14-17 of the Record on the application for reargument** and completely disregard the arguments advanced in petitioner's affidavit in support of the motion to renew (A 59-66).

Judge Elsworth's decision was reversed on appeal to the Appellate Division, Third Department, which held in part, that

> "We thus reach the conclusion that petitioner was lawfully appointed to a permanent position in the competitive class."

This conclusion should have determined this issue in plaintiff's favor, but the Appellate Division, *on its own motion*, ordered a "new trial".

This "new trial" is exposed as a farce in the minutes (A 77-A 110). The petitioner once again verified the allegations of the petition and the moving papers, and the respondents produced no witnesses.

Once again, the petition was dismissed at Special Term (A 111) but, *on the same Record*, the Appellate Division

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* The roster card and payroll sheet in evidence, Exhibits "2" (A 46-47) and "G" (A 40) preclude any other conclusions see pages 32 & 34 Appendix B.

** Hereinafter referred to by page number and the letters "RH".

affirmed, 20 A. D. 2d 535. This opinion must be read to be believed. Trapped by its original and inescapable conclusion that plaintiff was clearly entitled to a hearing on stated charges under Civil Service Law, Section 75.1.a., the Appellate Division grafted the last sentence of Civil Service Law, Section 75.1.(b). as an appendage to the clear and simple statement of Civil Service Law, Section 75.1.(a). and denied petitioner's application because he was a "deputy."[3]

This opinion was affirmed not once but twice by the Court of Appeals, *without opinion* (two judges taking no part).

Why? For the reasons which we respectfully submit should be the basis for the granting of this writ as follows:

Reasons for Granting the Writ

This Court should grant this writ for, at least, two reasons:

(1) These decisions jeopardize recruitment, tenure and independence in the Civil Service System of the State of New York; and (2) this application presents an opportunity to the United States Supreme Court to root out and destroy the rationalizations underlying the continued resistance and defiance of the Fourteenth Amendment to the United States Constitution in unpublicized areas of civil rights.

(1)

We reiterate, *the certification of the Federal question by the Court of Appeals establishes for once and for all that this petitioner was "a person holding a position by permanent appointment in the competitive class of the classified*

[3] Now, this was not easy to do, because the confusion between rights accorded veterans and competitive employees in this dual purpose statute had been pointed out and specifically clarified in the case of *Rohr* v. *Kenngott*, 288 N. Y. 97 (1942) cited in all petitioner's briefs.

Civil Service"; otherwise, the petitioner's dismissal created no constitutional issue.

Petitioner does not demand a right to a hearing under the Magna Carta or the Ninth Amendment or even under the rule established in *Peters* v. *Hobby*, 349 U. S. 331.

It is true that the petitioner has been grieviously hurt (as badly as the illustration in the footnotes to Judge Douglas' opinion in *Peters* v. *Hobby*). However, for the purposes of this application what happens to the petitioner as an individual is quite secondary, but what will happen to other professional persons in government employment, is quite another matter.

What can happen to other professional Civil Service employees as a result of *Murphy* v. *Larkin*? A great deal, which the petitioner has outlined under (a), (b) and (c) (7-10 RH).

The Court of Appeals has established generally, in *Behringer* v. *Parisi*, 5 N. Y. 2d 147 (159), that any person with delegated authority is a "deputy"; and, specifically, in *Byrnes* v. *Windels*, 265 N. Y. 403, that all lawyers have delegated authority.

Amongst others, 226 lawyers employed by the City of New York have been disenfranchised. In fact, tenure in the upper echelons throughout the competitive Civil Service is subject to the whim of every Commissioner and Department Head.

(2)

We can only speculate on the policy which the Court of Appeals sought to establish in this case, since the Court (of five) eschewed opinions on two occasions even though the petitioner's constitutional rights were in jeopardy.

We cannot conceive that the Court of Appeals accepted the double talk in 20 A. D. 595, therefore, we conclude that the Court has adopted a policy in this area of Civil

Rights that tenure in the Civil Service must yield to political expediency.

We are by no means alone in speculating upon the motives of the local courts in defying the plain language of the Fourteenth Amendment. Dean Rostow in his address (*supra*) explained the local defiance of the Fourteenth Amendment as follows:

> "The settlement of 1877 therefore clearly involved at least a delay in the enforcement of the amendment . . .
>
> "A complex process of self deception necessarily followed these events both in our law and in our public life. The law came to accept the compromise of 1877 although it never openly acknowledged them . . .
>
> ". . . changes in perspective have renewed a sense of shock in this country as we realize that we have tolerated hypocrisy or worse in the surviving resistence to the Fourteenth Amendment, and the political arrangements based upon the political settlement of 1877."

In another effort to account for the policies of the Court of Appeals in derogation of Civil Rights which we believe accounts for the decision in this case we note page 1 of the New York Times of July 15, 1965:

> "What has happened according to local authorities, is that a libertarian Supreme Court . . . has extended the Bill of Rights to a degree heretofore undreamed of . . .
>
> ". . . the state courts, after all are empowered to interpret the Federal Constitution. But, they said, the fact is that state judges have generally been conservative and out of step with the Supreme Court's broadening interpretation of individual rights.
>
> "Mainly because of this, persons unsuccessful in asserting Federal constitutional rights in state courts

have moved into Federal Court. 'The only thing I can figure,' said one lawyer, 'is that Charlie Desmond was just expressing, in the only way he had left, his disgust with the way the Federal judiciary has horned in on his baliwick, not only in reapportionment but all over the lot.' "[4]

We tried to point out the consequences of this political philosophy upon tenure, recruitment and independence in the Civil Service. Our arguments fell on deaf ears; however, in *this* Court we can look forward to a better understanding because the recruitment of a *qualified* and *independent* Federal Judiciary is wisely guaranteed. (United States Constitution, Article III, Section 1.)

How? By competitive examination? No. By political indoctrination? No. By tenure. Tenure is the key to the recruitment of a *qualified* and *independent* Judiciary. Tenure is the price of continuity, but it is the essence of *independence* which is the ideal of a Civil Service based upon merit and fitness.

The decision in the Court of Appeals assumes that qualified personnel will accept appointments too hard to fill positions without tenure. This is a dangerous speculation and disregards the constitutional criterion of merit and fitness. Furthermore, the decision disregards the recruitment procedures adopted by the Department of Personnel of the City of New York and illustrated in *Young* v. *Trussell*, 42 Misc. 2d 108, and *Altman* v. *Lang*, 44 Misc. 2d 751.

As we pointed out to the Court of Appeals, there are jobs such as the one assigned to the petitioner herein which

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[4] The Times article illustrates a confusion in essential terminology. It is not "libertarian" to affirm a vote, a hearing, or one of the freedoms to a person who is guaranteed the right to vote, the right to a hearing, or all of the freedoms. Conversely, it is not "conservatism" to deny a person these guaranteed rights or freedoms; it is simply *illegal*.

cannot be filled from a list as a result of a written test. Yet qualified and independent personnel cannot be recruited to these positions unless the Department of Personnel can offer tenure to the applicant.

The Court of Appeals has disregarded *Peters* v. *Hobby*, 349 U. S. 331; *Greene* v. *McElroy*, 360 U. S. 474 and *Slochower* v. *Board of Education*, 350 U. S. 55, all of which were briefed and argued upon the original appeal and application for rehearing.

Neither *Peters* nor *Greene* were employed in the Competitive Class of the Civil Service but the development of the community sense of justice led to the recognition of the protection which due process affords, and led this Court to hold that in fairness and justice a person entitled to a hearing must be accorded due process which includes the opportunity to confront one's accusers and defend one's property and right to work.

We freely concede that there is not the slightest connection between Dr. Slochower's situation and the petitioner's. This petitioner has never refused to testify before any Board or Tribunal upon the grounds that his testimony might tend to incriminate or degrade him; he has never been accused or suspected of membership in any obnoxious political group. No statute has been passed which discriminates against petitioner because of his race, color or creed. He was simply dismissed "without cause" and without a hearing on stated charges from a permanent position in the Competitive Class of the Classified Service for political, personal or no reason.

By statute, he was entitled to a hearing, and the only thing he has in common with Dr. Slochower is a right to a hearing which Dr. Slochower was guaranteed under Education Law, Section 6206 (2), (10) (McKinney's New York Laws), the counterpart of Civil Service Law, Section 75.

Was Dr. Slochower's right to a hearing more substantial or of more social significance than this petitioner's? We

say, no. Conversely this petitioner has no more right to a hearing than Dr. Slochower; we say, that any person who is entitled to a hearing for any reason is entitled to equal protection of the law, and this right should be accorded the same significance under the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted, and the constitutional question certified by the Court of Appeals of the State of New York should be reviewed and an affirmative answer given which will guaranty for once and for all that a hearing under the Civil Service Law is a substantial and significant right which in the development of the community sense of justice requires the protection which due process affords.

Respectfully submitted,

COOK & COOK,
Attorneys or Petitioner.

Of Counsel for Petitioner:
FRANCIS X. TUCKER,
SPENCER PINKHAM,
VERNON MURPHY.

August 12, 1965.

APPENDIX A

OPINIONS BELOW

Memorandum, Court of Appeals, State of New York.

15 NEW YORK REPORTS, 2D SERIES 770

APPEAL from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered December 26, 1963, which unanimously affirmed an order of the Supreme Court, entered in Ulster County upon a decision of the court at a Special and Trial Term (KENNETH S. MACAFFER, J.), which dismissed a petition for an order under article 78 of the former Civil Practice Act directing the reinstatement of petitioner as a Principal Attorney in the Law Department of the City of New York, said order of the Supreme Court having been made following a prior order of said Appellate Division, entered August 17, 1962, which (1) reversed an order of the Supreme Court at Special Term (ROSCOE V. ELSWORTH, J.), entered in Ulster County, dismissing the said petition upon motion of respondents, and (2) denied respondents' motion to dismiss (see 17 A. D. 2d 87). On July 27, 1955 petitioner was appointed as an Assistant Corporation Counsel (Water Supply) in charge of the office of the Corporation Counsel of the City of New York in the City of Kingston. His appointment was made pursuant to former rule V (§ IX, subd. 10) of the then effective Rules and Regulations of the Civil Service Commission of the City of New York, which provided that the commission might exempt from competitive examination a person who was to be appointed for service in a locality outside the city and who was a resident of such locality, where appointment for such service from an eligible list was found to be "not practicable". Petitioner was appointed at a salary of $12,000 a year and his duties included the administration

of the Water Supply Act, the handling of proceedings relating to the acquisition of real estate by the Board of Water Supply, the defense and settlement of claims against the city arising out of the construction and maintenance of facilities for the supply of water to the city, and the supervision of the offices of the Corporation Counsel in the Cities of Kingston and Binghamton. On July 17, 1956 petitioner was informed by the then Corporation Counsel that his "position as Attorney" had been "up-graded under the Career and Salary Plan to the title of Principal Attorney". In February, 1957 petitioner was divested of his duties and authority and, on or about April 6, 1961, he was notified by the then Corporation Counsel that his "services as a provisional principal attorney * * * are hereby terminated effective April 5, 1961." In the Court of Appeals petitioner argued that he had been appointed to a permanent position in the competitive class of the city civil service and, under section 75 (subd. 1, par. [a]) of the Civil Service Law, could not be removed without a hearing upon stated charges; that, even if his appointment had not been in the competitive class, he could not be dismissed without a hearing since he was a veteran and, in view of the 1957 suspension of his duties, was not a "deputy" at the time of his dismissal within the meaning of section 75 (subd. 1, par. [b]) of said law, and that his removal without stated charges or a hearing violated his rights under the Fourteenth Amendment of the United States Constitution. Respondents argued that the rule pursuant to which petitioner was appointed was authorized only under former section 15 (subd. 2) of the Civil Service Law; that an appointment under said former section 15 (subd. 2) was exceptional and the appointee was thereby taken out of the competitive class and *pro hac vice* placed in the noncompetitive class; that this view was confirmed by the successor provision to former rule V (§ IX, subd.

10) which recited that persons engaged for employment pursuant thereto acquired no civil service status or privilege of tenure (§ VII, subd. 5.7.5); that petitioner's status was not altered by reason of the 1956 reclassification of his position; that he held the position of a deputy, notwithstanding his suspension from the duties of said position, and, accordingly, was not entitled to the protection afforded to a veteran in the noncompetitive class (Civil Service Law, § 75, subd. 1, par. [b]), and that his removal did not violate his constitutional rights since he was not entitled to the protection of any provision of section 75 of the Civil Service Law.

Spencer Pinkham for appellant.

Leo A. Larkin, Corporation Counsel (*Saul Moskoff* of counsel), for respondents.

Order affirmed, without costs; no opinion.

Concur: Chief Judge DESMOND and Judges DYE, FULD, VAN VOORHIS and SCILEPPI. Taking no part: Judges BURKE and BERGAN.

Appendix A.

Opinion of the Appellate Division, Third Department, December 20, 1963.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

December 20, 1963.
6173

[SAME TITLE]

Upon the prior appeal (17 A. D. 2d 87), we expressed our "conclusion that petitioner was lawfully appointed to a permanent position in the competitive class" (p. 90) and while our opinion admitted the possibility of a determination that "petitioner's appointment should be in the noncompetitive class" (p. 91), in this case the distinction is not important if petitioner was a deputy, as Special Term has now found; this because both classes, competitive and noncompetitive, are within the "classified service" (Civil Service Law, §40) in which we found (at p. 91) petitioner had "permanent employment" (§75, subd. 1, par. [b]) and in which he would, as a veteran, be entitled to charges of misconduct and a hearing before removal, *unless* he was a "deputy of any official or department" (par. [b], above cited). Conceding that, when appointed, he was indeed a deputy, petitioner contends that he ceased to be such when, for a period prior to his dismissal, he was not permitted to perform any of the duties of a deputy but was limited to such work as the corporation counsel from time to time assigned him; but this, as we indicated in our prior opinion (p. 32), "has no relevancy on the question whether he was a deputy."

In any event, there was no change in title, classification or salary prior to petitioner's dismissal and the evidence otherwise supports the Special Term finding.

Order unanimously affirmed, without costs.

Present—Bergan, P. J., Gibson, Herlihy, Reynolds and Taylor, JJ.

Appendix A.

Opinion of the Appellate Division, Third Department, August 1, 1962.

Before:

Hon. Francis Bergan,
Presiding Justice,
Hon. James Gibson,
Hon. J. Clarence Herlihy,
Hon. Walter B. Reynolds,
Hon. Donald S. Taylor,
Associate Justices.

[SAME TITLE]

BERGAN, P. J.:

Petitioner was appointed as Assistant Counsel (Water Supply) in the New York City civil service at the Kingston office of the Law Department on July 27, 1955. It is conceded that the position was then, and after its reclassification as Principal Attorney on June 1, 1956 continued to be, in the competitive class of the civil service.

Petitioner was removed from the position on April 5, 1961 without the preferment of charges and without a hearing after service of almost six years. He alleges in this Article 78 proceeding reviewing his dismissal that he is an honorably discharged veteran, having served in the Navy in World War II.

The provisions of Civil Service Law, § 75, subd. 1 (b) require that a person holding a position by "permanent appointment or employment" in the classified service who is a veteran be removed only for misconduct on charges after a hearing.

The appointment of petitioner was expressly made and his employment was continued, by virtue of a rule enacted by the Municipal Civil Service Commission of New

York City (Rule V, § IX, ¶ 10, of the *Municipal Civil Service Rules and Regulations*). Rule V generally deals with "Competitive Class"; Section IX with "Temporary and Exceptional Appointments".

Paragraph 10 provides that the Commission (i. e. the Municipal Civil Service Commission) may "exempt from competitive examination any person who is to be appointed for service in a locality outside the City of New York who is a resident of such locality, and when appointment for such service from an eligible list is found to be not practicable, but no such person shall be eligible for transfer or assignment to work within the city." Petitioner was at the time of appointment a resident of Kingston and the service he was to perform in the position was in Kingston. He was appointed pursuant to a resolution of the Municipal Civil Service Commission exempting him from examination, adopted in pursuance of Paragraph 10 of Section IX.

The respondents do not argue on appeal from the dismissal of the petition in this Article 78 proceeding that the rule under which petitioner was appointed was invalid; they argue merely that the petitioner's appointment pursuant to it was not permanent. They characterize it as an appointment of "a non-permanent character".

The rule was not, in the language of the grant of power by former Section 11, in this respect inconsistent with the Constitution or the provisions of the chapter, including former Civil Service Law, § 15, as they read at the time of petitioner's appointment. Those provisions *inter alia,* authorized a municipal commission to suspend the requirement for competition to fill a vacancy in the competitive class where "peculiar" and "exceptional" qualifications of a scientific, professional or educational character are required and competitive examination is impractical. (subd. 2).

Appendix A.

The resolution authorizing the appointment of petitioner without examination does not fit exactly within this statutory authorization, but it does come within the exact scope of the municipal rule.

The validity of Section IX (Paragraph 10) of Rule V does not itself depend on former Section 15. It is valid under the general grant of power pursuant to which it was enacted unless it is inconsistent with former Section 15. It is not in violation of the Constitution, since impracticability of examination is there made the test of the authorization of the Commission to exempt from competition.

And it seems to us that it is not inconsistent with former Section 15 or with subdivision 2 thereof, in particular, but rather an extension, in general harmony with the policy laid down in that subdivision, to essentially similar situations in which exemption from competition might be authorized.

Section 15 (2) does not provide that the specific instances there noted, i. e. qualifications of a "scientific, professional or educational character" are the only possible "exceptional" instances which may reasonably warrant exemptions from competitive examination; or that in the exercise of the rule-making power delegated by former Section 11 to the Municipal Commission with the approval of the Mayor and the State Commission, other and similar exceptional situations might not be provided for.

The answer of the respondents admits the making of the rule and the resolution of the Municipal Commission in pursuance of the rule; and hence the presumption must be indulged that in the promulgation of the rule the public officers concerned performed their duty according to law and that the necessary approval by the Mayor and the State Commission supported the rule.

An "exceptional" appointment made in the competitive class under subdivision 2 of former Section 15 is not to

be confused with a temporary or provisional appointment made under subdivision 3. As we read the statute, a valid exceptional appointment made without examination in the competitive class is a permanent appointment. The decision in *Koso v. Greene* (260 N. Y. 491), turned entirely on the status of provisional and temporary appointments under Section 15, and not exceptional ones, and has no bearing on the problem before us. We thus reach the conclusion that petitioner was lawfully appointed to a permanent position in the competitive class.

The decision of the Appellate Division, First Department, in *People ex rel. Rosenthal v. Travis* (169 App. Div. 203), upon which respondents rely heavily and which was cited at Special Term, throws some interesting light upon the problem and in effect would seem to sustain petitioner's right to a hearing on charges even if he is not deemed to be in the competitive class.

This case did deal with an "exceptional" appointment without examination under former Section 15, subd. 2. The court held that when such an appointment is made it is not in the competitive class but the appointee "is *pro hac vice* placed in a non-competitive class, and thus becomes subject to removal under circumstances applicable to persons in such class" (pp. 204, 205).

If such an evaluation is to be made with regard to the petitioner's status, it would seem evident that as a veteran he is entitled to a hearing on charges. It is clear that petitioner is not in the unclassified service (Civil Service Law, § 35). If, as *Rosenthal* would suggest, he is not in the competitive class, he necessarily must be, as *Rosenthal* also indicates, in the non-competitive class.

The present statute, in these respects re-enactments of its predecessor, makes this clear. The classified service comprises "all offices and positions" not in the unclassified service (Section 40); and the non-competitive class includes "all positions that are not in the exempt class or the labor

class and for which it is found by the commission having jurisdiction to be not practicable to ascertain the merit and fitness of applicants by competitive examination" (Section 42). That petitioner was appointed to a position in the classified service seems an inescapable result from the provisions of the statute and the rules; and the proceedings of the Municipal Commission and appointing officers.

It would be altogether reasonable, and consistent with the general policy of the statute and the usual practice of the State and various local commissions, to determine that petitioner's appointment should be in the non-competitive class of the civil service. It was a professional position of high responsibility outside the area of the employing municipality; and on all counts it could be found it would be difficult and impracticable to fill it with a competent appointee competitively. In its total effect and result, the respondents must be deemed to have followed such a course as this.

It seems clear after more than five years in the position to which petitioner was appointed in 1955 it became permanent "employment" in the classified service; and in respect of veterans the distinction between paragraphs (a) and (b) in Civil Service Law, § 75, subd. 1, is striking and could not be accidental.

Both paragraphs require charges of misconduct and a hearing before removal, but paragraph (a) merely provides this for a person holding a position "by permanent appointment" in the competitive class of the classified service; while paragraph (b) relating to veterans, provides this protection for a person holding a position "by permanent apointment or employment in the classified service". This means, we think that so long as petitioner is deemed to be in the classified service generally, if his employment is permanent, he is covered as a veteran.

Appendix A.

It is undisputed that petitioner occupied for over five years a position which was in the classified service. It is asserted by petitioner that other appointees under the same rule have served in Kingston as long as 15 years. These are certainly not "provisional" or "temporary" appointments and if, as he alleges, petitioner is a veteran, he ought to be covered by the statutory protection as a person permanently employed.

In dismissing the petition, the court at Special Term was of opinion petitioner was a deputy and hence not in any event entitled to charges and a hearing under Paragraph (b) of Section 75; but the court did not regard it as necessary to reach that question.

The petitioner may well be a deputy, as respondents argue, (*Matter of Byrnes v. Windels,* 265 N. Y. 403; *Matter of Bass v. Bragalini,* 286 App. Div. 944, lv. to appeal denied, *sub. nom. Matter of McInerney v. Bragalini,* 309 N. Y. 1032). This would depend on the resolution of factual issues which are not determinable on the pleadings and papers before us; among them the actual responsibilities and authority in relation to the corporation counsel exercised by the petitioner in his position. The title may not necessarily be controlling; but the delegation of authority and responsibility may well be determinative of the issue.

That petitioner was suspended from duties and responsibilities for a time before his removal and hence had then no authority to act is treated by him as a fact indicating he could not be a deputy during this suspension of duties. But this, we believe, has no relevancy on the question whether he was a deputy. There are other factual issues raised by the answer, including the allegation by petitioner that he is a veteran, which in any event require resolution by trial.

The order should be reversed without costs and the motion to dismiss denied.

Appendix A.

Remittitur of February 4, 1965.

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 4th day of February in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

WITNESS,

THE HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur February 4, 1965.

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3. No. 319.

In the Matter of the Application of

VERNON MURPHY,

Appellant,

vs.

LEO A. LARKIN, Corporation Counsel of the City of New York, & ors., &c.,

Respondents.

BE IT REMEMBERED, That on the 27th day of August in the year of our Lord one thousand nine hundred and sixty-

fourth, Vernon Murphy, the appellant—in this cause, came here unto the Court of Appeals, by Cook & Cook, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Leo A. Larkin, Corporation Counsel of the City of New York, & ors., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Leo A. Larkin, attorney, who also appeared pro se.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Spencer Pinkham, of counsel for the appellant, and by Mr. Saul Moskoff, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided,

to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, February 4, 1965.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL]

RAYMOND J. CANNON,
Clerk.

Appendix A.

NOTICE OF ENTRY

PLEASE TAKE NOTICE that an Order, of which the within is a copy, was this day duly entered and filed in the office of the Clerk of the County of Ulster.

New York, February 24th 1965.

LEO A. LARKIN,
Corporation Counsel,
Attorney for Respondents-Respondents,
Municipal Building,
New York 7, N. Y.

I have compared the within copy of an order with the original thereof and found it to be a true and complete copy.

.....
Acting Corporation Counsel

To:

COOK & COOK, Esqs.,
Attorneys for the Petitioner-Appellant,
63 John Street,
Kingston, N. Y.

Appendix A.

Remittitur of June 10, 1965.

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Tenth day of June, A. D. 1965.

Present, HON. CHARLES S. DESMOND, Chief Judge, presiding.

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1 No. 491

In the Matter of

the Application of VERNON MURPHY,

Appellant,

vs.

LEO A. LARKIN, Corporation Counsel of the City of New York, et al.,

Respondents.

A motion for reargument and/or to amend the remittitur in the above cause to this Court having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

ORDERED, that the said motion, insofar as it seeks amendment of the remittitur, be and the same hereby is granted;

the return of the remittitur is requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Appellant contended that his removal from his position without stated charges and a hearing constituted a violation of his rights to equal protection of the laws and due process under the Fourteenth Amendment to the United States Constitution. The Court of Appeals, passing upon such contentions, held that there was no violation of appellant's constitutional rights [15 NY 2d 770].

And the Supreme Court of Ulster County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

George Kimball,
Deputy Clerk.

APPENDIX B

EXHIBIT 2

Roster Card, Issued Petitioner.

025 — Dept.

18001 — Pos. No.

THE CITY OF NEW YORK
DEPARTMENT OF PERSONNEL
CIVIL SERVICE COMMISSION
299 Broadway, N. Y. 7, N. Y.

V MURPHY — Name — 18001 Pos. No.

ATTORNEY — Old Title

PRINCIPAL ATTORNEY — New Title

Notice of Classification Status.

In conformance with the resolutions establishing the career and salary plan for certain City employees and the pertinent tables of equivalency contained therein, and as a result of the on-the-job survey completed on June 30, 1956, your title has been reclassified as indicated above, effective January 1, 1956.

This action of the City Civil Service Commission does not grant permanent status in the higher title as listed herein to you if you are holding a position on a non-permanent basis during the leave of absence of a permanent incumbent.

DP 262A

Appendix B.

An employee may, if he feels aggrieved as a result of his classification, appeal to the Career and Salary Plan Classification Appeals Board. Such appeal must be submitted on Classification Appeal forms, (Form CAB-1) properly filled out to the Chairman, Career and Salary Plan Classification Appeals Board, 93 Worth Street, New York 13, N. Y. not later than February 20, 1957.

Classification Appeals form (Form CAB-1) and information regarding appeals procedure may be obtained from the employee's departmental personnel officer or from the Career and Salary Plan Classification Appeals Board at the above address.

November 20, 1956

/s/ S. FRANK A. SCHAEFER

FRANK A. SCHAEFER,
Secretary, City Civil Service Commission

Appendix B.

EXHIBIT G

(See opposite ☞)

Exhibit G.

PARTICULARS OF PAY ROLL

Original

The City of New York

Office of the Comptroller

PAY ROLL SHEET

Form A

Page No. 7 | Tape and Dept. Code J085 | Checks Dated and/or Pay Period Bi-Weekly 03/31/61 | Bank Letter 7 | Department or Agency Board of Water Supply

Code (1)	Line No. (2)	Title (3)	C.S. Title No. (4)	Salary (5)	Addl. Comp. Des. Code (15)	Distribution No. (6)	Net Amount Payable (19)
	EMPLOYEE DATA				Pay Date of (15B)		

Pension Registry or Social Security Number (7)	Leave Status (8)	Civil Service Class (9)	Position Number (10)	Grade (11)	Name (12)	C.S. Title No. (13)	Salary or Wage Rate (14)	Adj. (14)	Cl. 15A	Last Incr. M Y	Next Incr. M Y	Regular Gross Earned (16)	Check No. (18)	Family Court (19A)
1 07	L 1	Principal Attorney				30135	13200			0 0 0 5		Dist		
2 280644	B C	18001	28	V	Murphy	30135	13200		A	1 2		50630	93562	34660
3 07	L 2	Supervising Attorney				30130	11100							
4 86715	B C	18000	23	T R	Lee	30130	11100		A	7 1		42575	93563	27658
5 07	L 3	S R Attorney				30125	9000							
6 154746	B C	18002	18	F T	Murray	30125	9000		A	7 1		34520	93564	24647

PAYROLL DEDUCTIONS

	Retirement System Normal Rate (20)	Normal Amount (21)	Loan No. Inst. (22)	Loan Amount (23)		FICA Amount (25)	Federal With. Tax Cl. 26 A B Amount (27)	N. Y. State With. Tax (32)
			Arrears		Cl 24		Inst.	
	Rate (20A)	No. Inst. By Rate (21A)	No. Inst. By Amt. (22A)	Total Arrears (23A)	Misc. 1		No. Paid (26A) U. S. Bonds (27A)	Garnishee (32A)
1								
2	980	4962	69	2526	A	1519	M7 5837	1126
3								
4	1310	5577			A	1277	M2 6728	1335
5								
6	945	3262			A	1036	M3 4810	765

CERTIFICATE NO. 4A

(To be signed by the Personnel Director or other designated employee of the Department of Personnel.)

I hereby certify that this Pay Roll has been examined and that the persons named herein have been appointed, employed or promoted in accordance with the Civil Service Law, and the Rules and Regulations adopted in pursuance of said Law, with the exception of those marked*.

Signature (signed illegible)
Designated Employee